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## QUESTION PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment precludes a State from forfeiting a wife's interest in a car that her husband, a co-owner of the car, used in violation of state law, when the wife did not know that he would use it illegally.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Interest of the United States | 1 |
| Statement | 2 |
| Summary of argument | 5 |
| Argument: | |
| The abatement of the vehicle comports with the Due Process Clause of the Fourteenth Amendment | 7 |
| A. The Constitution bars the punitive forfeiture of property when the owner alleges and proves that he took all reasonable steps to prevent illegal use of the property | 7 |
| B. The "all reasonable steps" standard does not apply to all forfeitures or all claimants | 16 |
| C. Petitioner has not satisfied the "all reasonable steps" standard | 22 |
| D. The Court should reject the innocent owner standard that petitioner proposes | 26 |
| Conclusion | 30 |


## TABLE OF AUTHORITIES

Cases:


| | |
|---|---|
| *American Society of Mechanical Engineers, Inc.* v. *Hydrolevel Corp.*, 456 U.S. 556 (1982) | 20 |
| *Austin* v. *United States*, 113 S. Ct. 2801 (1993) | 10, 11, 20, 24 |
| *C.J. Hendry Co.* v. *Moore*, 318 U.S. 133 (1943) | 23 |
| *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974) | *passim* |
| *Concrete Pipe & Products of California, Inc.* v. *Construction Laborers Pension Trust*, 113 S. Ct. 2264 (1993) | 24 |
| *Dobbins's Distillery* v. *United States*, 96 U.S. 395 (1878) | 8 |
| *Dolan* v. *City of Tigard*, 114 S. Ct. 2309 (1994) | 15-16, 24 |
| *Grosfield* v. *United States*, 276 U.S. 494 (1928) | 18 |
| *Helvering* v. *Mitchell*, 303 U.S. 391 (1938) | 24 |

Cases—Continued: Page

*J.W. Goldsmith, Jr.- Grant Co.* v. *United States*, 254 U.S. 505 (1921) ..... 8, 9, 11, 16
*Lucas* v. *South Carolina Coastal Council*, 112 S. Ct. 2886 (1992) ..... 18, 24
*Martin* v. *Ohio*, 480 U.S. 228 (1987) ..... 24
*Mathews* v. *Eldridge*, 424 U.S. 319 (1976) ..... 24
*Mugler* v. *Kansas*, 123 U.S. 623 (1887) ..... 18
*New York Central R.R.* v. *White*, 243 U.S. 188 (1917) .. 19
*One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232 (1972) ..... 18, 24
*One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693 (1965) ..... 18
*Pacific Mutual Life Ins. Co.* v. *Haslip*, 499 U.S. 1 (1991) ..... 20
*Peisch* v. *Ware*, 8 U.S. (4 Cranch) 347 (1808) ..... 14
*People* v. *Schoonmaker*, 216 N.W. 456 (Mich. 1927) ..... 4
*Redford* v. *United States Dep't of Treasury*, 691 F.2d 471 (10th Cir. 1982) ..... 25
*Southeastern Telegraph & Telephone Co.* v. *Danaher*, 238 U.S. 482 (1915) ..... 14
*State* v. *1979 Pontiac Trans Am*, 487 A.2d 722 (N.J. 1985) ..... 12
*State ex rel. Cahalan* v. *Bernstein*, 226 N. W.2d 56 (Mich. Ct. App. 1974) ..... 17
*State ex rel. Macomb County Prosecuting Attorney* v. *Mesk*, 333 N.W.2d 184 (Mich. Ct. App. 1983) ..... 17
*Sweet* v. *Rechel*, 159 U.S. 380 (1895) ..... 18
*TXO Production Corp.* v. *Alliance Resources Corp.*, 113 S. Ct. 2711 (1993) ..... 14
*The Palmyra*, 25 U.S. (12 Wheat.) 1 (1827) ..... 7
*Threlkeld* v. *State*, 586 So. 2d 756 (Miss. 1991) ..... 12
*United States* v. *Boynton*, 297 F. 261 (E.D. Mich. 1924) ..... 18
*United States* v. *Cargo of Brig Malek Adhel*, 43 U.S. (2 How.) 210 (1844) ..... 7-8
*United States* v. *Jeffers*, 342 U.S. 48 (1951) ..... 18



Cases—Continued: Page

*United States* v. *1966 Beechcraft Aircraft*, 777 F.2d 947 (4th Cir. 1985) ..... 11-12, 29
*United States* v. *92 Buena Vista Avenue*, 113 S. Ct. 1126 (1993) ..... 8
*United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354 (1984) ..... 18
*United States* v. *One Blue Lobster Vessel Named Tony, Jr.*, 639 F. Supp. 865 (S.D. Fla. 1986) ..... 29
*United States* v. *One Ford Coupe Automobile*, 272 U.S. 321 (1926) ..... 8
*United States* v. *One 1980 Bertram 58' Motor Yacht*, 876 F.2d 884 (11th Cir. 1989) ..... 12
*United States* v. *One 1986 Chevrolet Monte Carlo*, 817 F. Supp. 729 (N.D. Ill. 1993) ..... 21
*United States* v. *One 1983 Homemade Vessel Named "Barracuda,"* 858 F.2d 643 (11th Cir. 1988) ..... 18
*United States* v. *One 1982 28' International Vessel*, 741 F.2d 1319 (11th Cir. 1984) ..... 12
*United States* v. *One 1957 Rockwell Aero Commander 680 Aircraft*, 671 F.2d 414 (10th Cir. 1982) ..... 12
*United States* v. *One 1970 Pontiac GTO*, 529 F.2d 65 (9th Cir. 1976) ..... 23
*United States* v. *One 1971 Chevrolet Corvette*, 393 F. Supp. 344 (E.D. Pa. 1975) ..... 28
*United States* v. *One 1976 Cessna Model 210L Aircraft*, 890 F.2d 77 (8th Cir. 1989) ..... 11
*United States* v. *One 1976 Lincoln Mark IV*, 462 F. Supp. 1383 (W.D. Pa. 1979) ..... 30
*United States* v. *One 1973 Buick Riviera Automobile*, 560 F.2d 897 (8th Cir. 1977) ..... 28
*United States* v. *141st Street Corp.*, 911 F.2d 870 (2d Cir. 1990), cert. denied, 498 U.S. 1109 (1991) ... 2, 12, 20-21, 29
*United States* v. *One Parcel of Land Located at 7326 Highway 45 North*, 965 F.2d 311 (7th Cir. 1992) ..... 20
*United States* v. *One Parcel of Property with Bldgs., Appurtenances & Improvements*, 960 F.2d 200 (1st Cir. 1992) ..... 25

Cases—Continued: Page

*United States* v. *One Parcel of Real Estate*, 852 F. Supp. 1013 (S.D. Fla. 1994) ..... 21
*United States* v. *One Parcel of Real Estate Consisting of Approximately 4,657 Acres*, 730 F. Supp. 423 (S.D. Fla. 1989) ..... 21
*United States* v. *One 1980 Stapleton Pleasure Vessel Named Threesome*, 575 F. Supp. 473 (S.D. Fla. 1983) .. 29
*United States* v. *One Tintoretto Painting*, 691 F.2d 603 (2d Cir. 1982) ..... 12, 24
*United States* v. *Park*, 421 U.S. 658 (1975) ..... 15
*United States* v. *Santoro*, 866 F.2d 1538 (4th Cir. 1989) ..... 23
*United States* v. *$6,700 in U.S. Currency*, 615 F.2d 1 (1st Cir. 1980) ..... 12
*United States* v. *$69,292 in U.S. Currency*, No. 93-56545 (9th Cir. Aug. 7, 1995) ..... 11
*United States* v. *$250,000 in U.S. Currency*, 808 F.2d 895 (1st Cir. 1987) ..... 23
*United States* v. *228 Acres of Land & Dwelling*, 916 F.2d 808 (2d Cir. 1990), cert. denied, 498 U.S. 1091 (1991) ..... 23
*United States* v. *$2,500 in U.S. Currency*, 689 F.2d 10 (2d Cir. 1982), cert denied, 465 U.S. 1099 (1984) ..... 23
*Van Oster* v. *Kansas*, 272 U.S. 465 (1926) .... 5, 8, 9, 11, 16, 19
*Young* v. *Masci*, 289 U.S. 253 (1933) ..... 19

Constitution, statutes and regulations:

U.S. Const.:
Amend. V (Just Compensation Clause) ..... 9, 15-16
Amend. VIII (Excessive Fines Clause) ..... 11
Amend. XIV ..... 12, 15
Due Process Clause ..... 12, 14
18 U.S.C. 545 ..... 1
18 U.S.C. 1955 ..... 1
19 U.S.C. 1595a (1988 & Supp. V 1993) ..... 1
19 U.S.C. 1615 ..... 22
19 U.S.C. 1703(a) ..... 18
21 U.S.C. 881(a) ..... 11



Statutes and regulations—Continued: Page

31 U.S.C. 5317 (1988 & Supp. V 1993) ..... 1
Mich. Comp. Laws Ann. (West 1987):
§ 600.3801 (Supp. 1995) ..... 2
§ 600.3805 ..... 2
§ 600.3810(2) ..... 2
§ 600.3815(2) ..... 2
§ 600.3825(1) ..... 17
§ 600.3825(1)-(3) ..... 2
§ 600.3825(3) ..... 3
§ 750.338b ..... 2
N.J. Stat. Ann. § 2C:64-5(b) (West Supp. 1995) ..... 12
28 C.F.R. 9.5(b)(5) ..... 12

Miscellaneous:

7A Am. Jur. 2d *Automobiles & Highway Traffic* (1980) . 19
52 Fed. Reg. 11,437-11,438 (1987) ..... 29
W. Prosser, *Handbook of the Law of Torts* (4th ed. 1971) ..... 21

# In the Supreme Court of the United States

OCTOBER TERM, 1995

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No. 94-8729

TINA B. BENNIS, PETITIONER

*v.*

STATE OF MICHIGAN

---

*ON WRIT OF CERTIORARI*
*TO THE MICHIGAN SUPREME COURT*

---

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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### INTEREST OF THE UNITED STATES

This case concerns the extent to which the Constitution limits the forfeiture of property owned by a person who was unaware of and uninvolved in the criminal conduct on which forfeiture was based. The United States seeks forfeiture of the proceeds and instrumentalities of criminal activity under various federal statutes. Although many of those federal statutes expressly limit the forfeiture of the property of an "innocent owner," some of them do not. See 31 U.S.C. 5317 (1988 & Supp. V 1993); 19 U.S.C. 1595a (1988 & Supp. V 1993); 18 U.S.C. 1955; 18 U.S.C. 545. Moreover, some federal statutes that do contain innocent owner provisions have been construed in light of courts' views of applicable constitutional limits. See,

*e.g.*, *United States* v. *141st Street Corp.*, 911 F.2d 870, 877 (2d Cir. 1990), cert. denied, 498 U.S. 1109 (1991). The Court's decision in this case is therefore likely to affect federal forfeiture proceedings.

## STATEMENT

1. On October 3, 1988, two Detroit, Michigan, police officers saw petitioner's husband, John Bennis, stop the 1977 Pontiac he was driving and pick up a woman in an area frequented by prostitutes. When the officers approached the car moments later, they saw Mr. Bennis and the woman engaged in sexual activity in the front seat. Based on that incident, Mr. Bennis was arrested and later convicted of gross indecency, in violation of Mich. Comp. Laws Ann. § 750.338b (West 1987). In addition, the prosecutor for Wayne County, Michigan, brought an action against Mr. Bennis and petitioner, as co-owners of the car, seeking its abatement. J.A. 2-6, 46-47; see Mich. Comp. Laws Ann. §§ 600.3805, 600.3810(2) (West 1987).

Michigan law declares that "[a]ny * * * vehicle * * * used for the purpose of lewdness, assignation, or prostitution" is a nuisance. Mich. Comp. Laws Ann. § 600.3801 (West 1987 & Supp. 1995). The law authorizes an action for abatement against the owners of the property alleged to be a nuisance. Mich. Comp. Laws Ann. §§ 600.3805, 600.3810(2) (West 1987). In such an action, "[p]roof of knowledge of the existence of the nuisance on the part of the defendants or any of them, is not required." Mich. Comp. Laws Ann. § 600.3815(2) (West 1987). The law provides that, when a vehicle is found to be a nuisance, the court must order its sale. Mich. Comp. Laws Ann. § 600.3825(1) through (3) (West 1987). The proceeds of the sale are used first to pay the expenses of the sale and then to



pay any liens "created without the lienor having any notice that such property was being used or was to be used for the maintenance of a nuisance"; any balance goes into the general fund of the state treasury. Mich. Comp. Laws Ann. § 600.3825(3) (West 1987).

In their answer to the complaint for abatement of their car, the Bennises alleged as an affirmative defense that the complaint "failed to plead any facts or allegations that [petitioner] had any knowledge of the alleged nuisance." Answer at 3. They also alleged that the abatement statute was unconstitutionally "vague and overbroad" (*ibid.*), but they did not otherwise challenge its constitutionality.

At a bench trial in the Third Circuit Court for Wayne County, the prosecutor presented testimony by the arresting officers and people from the neighborhood of the arrest. A security guard who worked in the neighborhood testified that he saw Mr. Bennis solicit prostitutes in the area on two occasions before his arrest. Tr. 144-145; see also J.A. 52-53. The only defense witness was petitioner. She described how she and her husband bought the car and then testified as follows about her knowledge of his conduct (J.A. 9):

> Q. Were you present with your husband when he was driving home from work on October 3rd?
>
> A. No.
>
> Q. Did you have any knowledge that your husband was going to do anything but come directly home from work?
>
> A. No.
>
> Q. Do you have any knowledge of your husband soliciting prostitutes?
>
> A. No.

The trial court entered a judgment of abatement, ordering the sale of the Bennises' car. J.A. 27-28. The court did not address petitioner's claim that her lack of knowledge of her husband's illegal use of the car barred the forfeiture. See J.A. 13-26.

2. The Michigan Court of Appeals reversed by a 2-1 vote. J.A. 29-44. It acknowledged that the abatement statute appeared to make it irrelevant whether petitioner knew of her husband's illegal conduct. J.A. 31. Relying on *People* v. *Schoonmaker*, 216 N.W. 456 (Mich. 1927), however, the court held that the statute required the prosecutor "to demonstrate that defendants knew of the use of the vehicle as a nuisance." J.A. 30. It also held that the record did not prove that petitioner had such knowledge. J.A. 32. As an alternative ground for reversal, the court held that Mr. Bennis's conduct did not constitute a nuisance under state law, because it was not continuing in nature and because there was no "proof that the [sexual] activit[y] * * * [was] in exchange for [money]." J.A. 35.

3. The Michigan Supreme Court, by a 4-3 vote, reversed the court of appeals' decision and upheld the abatement of the car. J.A. 45-97. Three justices joined in a written opinion for reversal, and a fourth justice concurred in that result. J.A. 45-71. The three remaining justices dissented; two of them issued written dissents. J.A. 71-88, 88-95.

The three-judge plurality concluded, first, that the abatement comported with state law. J.A. 48-66. It held that Mr. Bennis used the car for an act of "lewdness, assignation, or prostitution" within the meaning of the abatement statute, see J.A. 48-54, and thereby contributed to the existence of a public nuisance, see J.A. 54-63. It further held that, "[i]n light of the



plain language of the nuisance abatement statute" and case law after *Schoonmaker*, "the statute expressly obviates the requirement that an owner consent to or acquiesce in the illegal use of the property." J.A. 65.

The plurality next held that the forfeiture of petitioner's interest in the car did not violate the federal Constitution. J.A. 66-70. It based that holding on *Van Oster* v. *Kansas*, 272 U.S. 465 (1926), which rejected a due process challenge to the forfeiture of a vehicle by an owner who lacked knowledge of the illegal conduct that formed the basis for the forfeiture, and on *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 683 (1974), which reaffirmed that "the innocence of the owner of property subject to forfeiture has almost uniformly been rejected as a defense." J.A. 66-68. In light of those decisions, the plurality stated that petitioner's claim of a lack of knowledge of her husband's illegal purpose "is without constitutional significance." J.A. 68.

Neither dissenting opinion disagreed with the plurality's analysis of the federal constitutional issue. Indeed, one of the dissenting opinions, which was joined by all three dissenting justices, stated that "abating the property of innocent owners in forfeiture actions arguably does not violate an owner's constitutional right to due process." J.A. 80-81.

## SUMMARY OF ARGUMENT

A. We agree with this Court's suggestion in *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974), that the Constitution generally bars the punitive forfeiture of property from an owner who alleges and proves that he took all steps that reasonably could be expected to prevent the illegal conduct that led to forfeiture. Applied in the present

context, the "all reasonable steps" standard is consistent with this Court's precedents and reasonably accommodates governmental and private interests.

B. The "all reasonable steps" standard does not necessarily apply in all contexts, however. The present case involves the forfeiture of non-contraband under a statute that the State has indicated is intended to be punitive, as applied in the present context. This Court need not resolve the existence and nature of an innocent owner defense in other contexts. Moreover, respondent does not rely on traditional principles of vicarious liability to contend that petitioner should be deemed to have had knowledge of, or responsibility for, the illegal conduct that led to forfeiture. In an appropriate case, those principles could defeat innocent owner status.

C. Under *Calero-Toledo*, petitioner bore the burden of alleging and proving that she took all reasonable steps to prevent the illegal use of her property. Like the property owner in *Calero-Toledo*, petitioner failed to plead or prove those issues. In particular, petitioner did not allege or prove that she lacked reason to know of the unlawful conduct and that she took reasonable action under the circumstances to prevent it.

D. This Court should reject the "reasonable entrustment" standard that petitioner proposes. In many cases, an owner can reasonably be expected to take precautions against illegal use of his property after, as well as before, entrusting it to someone else. The Court should also reject petitioner's argument that a spouse who lacks actual knowledge or reason to know of illegal conduct by the other spouse can never



be expected to take affirmative precautions in regard to jointly owned property.

## ARGUMENT

### THE ABATEMENT OF THE VEHICLE COMPORTS WITH THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

#### A. The Constitution Bars The Punitive Forfeiture Of Property When The Owner Alleges And Proves That He Took All Reasonable Steps To Prevent Illegal Use Of The Property

In a long line of cases, this Court has upheld the forfeiture of property that has been used illegally, even though the owner of the property was unaware of and uninvolved in the illegal use. The Court has also suggested, however, that the Constitution might bar a forfeiture if the owner alleges and proves that he took all steps that could reasonably be expected to prevent the illegal use. In our view, there are situations in which such a showing by an owner would establish a constitutional defense. As applied in the context of this case, the "all reasonable steps" standard recognizes the interest of blameless property owners without thwarting the legitimate purposes of forfeiture statutes.

1. In *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974), this Court reviewed its decisions concerning "innocent owner" claims in forfeiture cases. Surveying a consistent course of decisions, the Court noted that "the innocence of the owner of property subject to forfeiture has almost uniformly been rejected as a defense." *Id.* at 683 (discussing *The Palmyra*, 25 U.S. (12 Wheat.) 1 (1827); *United States* v. *Cargo of Brig Malek Adhel*, 43 U.S. (2 How.) 210,

233-235 (1844) (Story, J.); *Dobbins's Distillery* v. *United States*, 96 U.S. 395, 399-401 (1878)). See also *United States* v. *92 Buena Vista Avenue*, 113 S. Ct. 1126, 1132 (1993) (plurality opinion) (noting the historic availability of forfeiture "notwithstanding the innocence of the owner"). The Court in *Calero-Toledo* took particular note of two cases decided this century that had rejected innocent owner claims involving, as does this case, the forfeiture of vehicles from owners who were unaware of and uninvolved in the unlawful conduct that supported the forfeiture action. See 416 U.S. at 685-686.

In *J.W. Goldsmith, Jr.-Grant Co.* v. *United States*, 254 U.S. 505, 509 (1921), the Court upheld against a due process challenge the forfeiture of a taxicab used to transport alcohol in violation of federal law, even though the owner of the taxicab (a dealer in cars who had retained title while financing the purchase) had no knowledge, or even "any notice or reason to suspect," that the car would be used illegally. Likewise, in *Van Oster* v. *Kansas*, 272 U.S. 465, 466-469 (1926), the Court upheld the forfeiture of a car used to transport intoxicating liquor, in violation of state law, by a person to whom the owner had entrusted the car. The Court rejected the owner's claim that due process entitled her to resist the forfeiture because she lacked knowledge of, and did not authorize, the illegal use. *Id.* at 467-468. See also *United States* v. *One Ford Coupe Automobile*, 272 U.S. 321, 332 (1926).

The Court in *Calero-Toledo* identified several rationales for why "[j]udicial inquiry into the guilt or innocence of the owner could be dispensed with." 416 U.S. at 686. As *Goldsmith-Grant Co.* had explained, by authorizing the forfeiture of property used in



crimes regardless of the owner's knowledge of or involvement in the crimes, "Congress interposes the care and responsibility of their owners in aid of the prohibitions of the law and its punitive provisions." 254 U.S. at 510, quoted in *Calero-Toledo*, 416 U.S. at 685-686. And, as *Van Oster* had noted, forfeiture laws that apply without regard to the owner's knowledge of or involvement in criminal activity "build[] a secondary defense against a forbidden use and preclude[] evasions by dispensing with the necessity of judicial inquiry as to collusion between the wrongdoer and the alleged innocent owner." 272 U.S. at 467-468, quoted in part in *Calero-Toledo*, 416 U.S. at 686.

The Court in *Calero-Toledo* concluded that, even if a statutory forfeiture scheme affords no defense to "innocents," it is nonetheless constitutional, in light of "[t]he historical background of forfeiture statutes in this country and this Court's prior decisions sustaining their constitutionality." 416 U.S. at 680. The Court then applied that view to the facts before it. In that case, Puerto Rico forfeited a yacht on which the Puerto Rico police found marijuana that had apparently been brought on board by one of the yacht's lessees. *Id.* at 665. The yacht company-lessor "was neither involved in nor aware of the act of the lessee which resulted in the forfeiture." *Id.* at 664; see also *id.* at 668. The Court rejected the yacht company's contention that the forfeiture violated the Just Compensation Clause. See *id.* at 680-690. The Court determined that, as applied to conveyances used in connection with drug crimes, the Puerto Rico forfeiture statutes "foster[ed] the purposes served by the underlying criminal statutes, both by preventing further illicit use of the conveyance and by imposing an eco-

nomic penalty, thereby rendering illegal behavior unprofitable." *Id.* at 687. The Court further determined that, as "applied to lessors, bailors, or secured creditors who are innocent of any wrongdoing," those statutes "may have [had] the desirable effect of inducing them to exercise greater care in transferring possession of their property." *Id.* at 688.

While reaffirming its prior decisions, the Court in *Calero-Toledo* stated that the "broad sweep" of forfeiture statutes could "give rise to serious constitutional questions" with respect to two categories of owners:

> It * * * has been implied that it would be difficult to reject the constitutional claim of an owner whose property subjected to forfeiture had been taken from him without his privity or consent. Similarly, the same might be said of an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property[.]

*Calero-Toledo*, 416 U.S. at 689 (citations omitted). The Court found it unnecessary to decide whether the Constitution precluded forfeiture in those two situations, because the yacht company "voluntarily entrusted the lessees with possession of the yacht, and no allegation ha[d] been made or proof offered that the [yacht] company did all that it reasonably could to avoid having its property put to an unlawful use." *Id.* at 690; see also *Austin* v. *United States*, 113 S. Ct. 2801, 2809 & n.10 (1993) (reserving question whether due process principles would bar punitive forfeiture of property "when the owner had done all that reasonably could be expected to prevent the unlawful use of his property").[1]



2. The "all reasonable steps" standard suggested in *Calero-Toledo* has been widely accepted as a constitutional limit on statutory forfeitures. The lower federal courts have generally held that it provides the constitutional limit on civil forfeiture of property that has been used in violation of federal statutes.[2]

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[1] Petitioner contends that the analysis of this Court's precedents in *Austin* provides "a historical basis for the due process principle implicitly recognized in" *Calero-Toledo*. Pet. Br. 19. *Austin*'s reservation of the due process issue, however, indicates that the Court viewed its precedents as inconclusive. In fact, before *Calero-Toledo*, those precedents had reserved only the narrow question whether property could be forfeited if it was taken without the owner's consent and then put to an unlawful use. See *Van Oster*, 272 U.S. at 467 ("It is unnecessary for us to inquire whether the police power of the state extends to the confiscation of the property of innocent persons appropriated and used by the law breaker without the owner's consent."); *Goldsmith-Grant Co.*, 254 U.S. at 512 (reserving "opinion as to whether the [statute in question] can be extended to property stolen from the owner or otherwise taken from him without his privity or consent"). Petitioner also errs in claiming support for an innocent owner defense in *Austin*'s holding that the Eighth Amendment's Excessive Fines Clause applies to civil forfeiture under 21 U.S.C. 881(a). Pet. Br. 18 n.12. Contrary to petitioner's suggestion, the Court did not adopt a specific test of proportionality for all civil forfeitures that "presupposes" a culpable owner (*ibid.*). Indeed, the Court explicitly declined to formulate a constitutional standard for proportionality that depended on that or any other factor. 113 S. Ct. at 2812 & n.15.

[2] See *United States* v. *$69,292 in U.S. Currency*, No. 93-56545 (9th Cir. Aug. 7, 1995), slip op. 3; *United States* v. *One 1976 Cessna Model 210L Aircraft*, 890 F.2d 77, 80-82 (8th Cir. 1989); *United States* v. *1966 Beechcraft Aircraft*, 777 F.2d 947,

Courts have also relied on the standard to interpret the scope of statutory innocent owner defenses.[3] In a similar vein, the federal government has incorporated the "all reasonable steps" standard into regulations governing the remission and mitigation of forfeitures.[4] And some state courts have construed their forfeiture statutes to protect claimants who meet the "all reasonable steps" standard. See, *e.g.*, *Threlkeld* v. *State*, 586 So. 2d 756, 759 (Miss. 1991) (construing state forfeiture statute to avoid violation of state constitution's due process guarantee); *State* v. *1979 Pontiac Trans Am*, 487 A.2d 722, 726-727 (N.J. 1985) (construing state statute to avoid violation of Fourteenth Amendment Due Process Clause); see also N.J. Stat. Ann. § 2C:64-5(b) (West Supp. 1995) (codifying "all reasonable steps" standard).

In our view, the "all reasonable steps" standard articulated in *Calero-Toledo* reflects the constitutional limit applicable to some forfeiture statutes, including the one at issue in this case. As this Court's many cases rejecting innocent owner claims demonstrate, see pp. 7-8, *supra*, the Constitution does not bar forfeitures when all that the owner establishes is

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951-952 (4th Cir. 1985); *United States* v. *One 1982 28' International Vessel*, 741 F.2d 1319, 1322-1323 (11th Cir. 1984); *United States* v. *One Tintoretto Painting*, 691 F.2d 603, 607 (2d Cir. 1982); *United States* v. *One 1957 Rockwell Aero Commander 680 Aircraft*, 671 F.2d 414, 418 (10th Cir. 1982); *United States* v. *$6,700 in U.S. Currency*, 615 F.2d 1, 3 (1st Cir. 1980).

[3] See *United States* v. *141st Street Corp.*, 911 F.2d 870, 877 (2d Cir. 1990), cert. denied, 498 U.S. 1109 (1991); *United States* v. *One 1980 Bertram 58' Motor Yacht*, 876 F.2d 884, 888 (11th Cir. 1989).

[4] See 28 C.F.R. 9.5(b)(5); see also *Calero-Toledo*, 416 U.S. at 689 n.27.



lack of knowledge, or reason to know, of the illegal conduct that caused the forfeiture, and lack of participation in that conduct. As *Calero-Toledo* reaffirmed, when an owner can do no more than demonstrate those conditions, forfeiture statutes serve "legitimate governmental interests," 416 U.S. at 688, because they give property owners an incentive to take affirmative steps to detect and prevent the illegal use of their property, and they eliminate the need for judicial inquiry into the possibility that the alleged innocent owner is in collusion with the person making illegal use of the property. Those traditional justifications for rejecting "innocent owner" claims reflect the heavy burden that is permissibly placed on the property owner to prevent, if reasonably possible, the involvement of his property in illegal activity.

In contrast, when an owner pleads and proves that he took all reasonable steps to prevent the involvement of his property in the illegal conduct underlying the forfeiture, the balance of interests is different. An owner who "ha[s] done all that reasonably could be expected to prevent the proscribed use of his property," *Calero-Toledo*, 416 U.S. at 689, has, by definition, minimized the foreseeable risk of illegal use and, in turn, the risk of forfeiture. Once the owner has minimized the risk of forfeiture by taking all reasonable precautions, he is generally unlikely to take additional, "ultrareasonable" steps to eliminate the residual risk. Moreover, an owner who can prove that he took all reasonable, affirmative measures to prevent unlawful use is far less likely to be in collusion with the person who uses the property illegally than is an owner who merely asserts lack of knowledge or participation in the illegal use.

In light of those considerations, we believe that the *Calero-Toledo* Court correctly suggested that the "legitimate governmental interests" traditionally served by forfeiture statutes would not be furthered as applied to owners who took all reasonable steps to prevent the illegal use, and that the deprivation of such owners' property interests might be regarded as "unduly oppressive." *Calero-Toledo*, 416 U.S. at 688, 690. Due process principles have long afforded protection from punitive government action against essentially blameless individuals who did all that could reasonably be expected under the circumstances. As long ago as *Peisch* v. *Ware*, 8 U.S. (4 Cranch) 347, 363 (1808), Chief Justice Marshall wrote that "a forfeiture can only be applied to those cases in which the means that are prescribed for the prevention of a forfeiture may be employed." In *Southwestern Telegraph & Telephone Co.* v. *Danaher*, 238 U.S. 482, 490-491 (1915), the Court invalidated a penalty against a telephone company under the Due Process Clause of the Fourteenth Amendment because it was "plainly arbitrary and oppressive" in light of the telephone company's innocent conduct, which involved "no intentional wrongdoing; no departure from any prescribed or known standard of action, and no reckless conduct." See *TXO Production Corp.* v. *Alliance Resources Corp.*, 113 S. Ct. 2711, 2718 n.17 (1993) (plurality opinion) (noting substantive due process limits on penalties and observing that *Danaher* had "emphasized the fact that the Company was punished for conduct that had been undertaken in complete good faith"); *id.* at 2731 (O'Connor, J., dissenting) (quoting *Danaher*). And in a related context, this Court has upheld strict, vicarious criminal liability



for a corporate officer based on his company's conduct, provided that the defendant was not " 'powerless' to prevent or correct the violation." *United States* v. *Park*, 421 U.S. 658, 673 (1975).[5]

There are, of course, many different types of forfeiture statutes. Whether a constitutional "innocent owner" defense may be asserted will vary depending on the particular governmental interests the statute serves and the nature of the property that is affected. See pp. 16-21, *infra*. But in some cases, a property owner who makes the showing that he took "all reasonable steps" to prevent the illegal use will have established a constitutional defense to the forfeiture of his property.[6]

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[5] The Court in *Calero-Toledo* supported the "all reasonable steps" standard primarily by referring to the early common law history that "sought to mitigate the harshness of felony and deodand forfeitures" and the "ameliorative policy" both in England and in this country "of providing administrative remissions and mitigations of statutory forfeitures in most cases where the violations are incurred 'without willful negligence' or an intent to commit the offense." 416 U.S. at 689 n.27. That history does not appear to establish the specific contours of any right possessed by innocent owners; at most, it indicates a general concern to provide some mechanism to alleviate harsh forfeitures imposed on "innocent owners" in some instances. Notwithstanding its lack of a clearcut historical pedigree, we believe that the "all reasonable steps" standard rests on values traditionally recognized in due process analysis, accords with this Court's prior decisions, and respects the interests of private property owners, while accommodating governmental interests underlying forfeiture statutes.

[6] Petitioner invokes both the doctrine of substantive due process and the Just Compensation Clause of the Fifth Amendment, as applied to States under the Fourteenth Amendment (see, *e.g.*, *Dolan* v. *City of Tigard*, 114 S. Ct. 2309,

### B. The "All Reasonable Steps" Standard Does Not Apply To All Forfeitures Or All Claimants

This case involves only one type of forfeiture and one type of claimant. While we believe that the "all reasonable steps" standard is applicable in this case, the availability and nature of any constitutionally required innocent owner defense in other settings raises different issues and requires a different analysis. The Court need not address those issues in this case.

1. *This case involves the punitive forfeiture of non-contraband based on its use for a vice offense.* It is important, first, to clarify the nature of the property at issue and the nature and purpose of the statute under which it was forfeited.

It appears that, as applied in this case, the Michigan abatement statute serves, to a significant extent,

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2316 (1994)). See Pet. i. Analysis under the Just Compensation Clause, however, does not appear to add anything to the constitutional analysis in this context. In discussing this Court's precedents addressing innocent owner claims, the Court in *Calero-Toledo* did not distinguish the application of just compensation principles from substantive due process principles. For example, in *Goldsmith-Grant Co.*, the Court had considered whether the forfeiture of the owner's property violated "the due process of law required by the Constitution." 254 U.S. at 510. In *Calero-Toledo*, however, the Court stated that *Goldsmith-Grant Co.* had "held that the federal tax-fraud forfeiture statute did not deprive an innocent owner of his property in violation of the Fifth Amendment." 416 U.S. at 685. And the *Calero-Toledo* Court characterized the due process claim at issue in *Van Oster*, 272 U.S. at 466, as simply a "Fourteenth Amendment attack." 416 U.S. at 686. Elsewhere, the Court in *Calero-Toledo* referred simply to the "constitutionality" of the forfeiture of the property of innocent owners. See *id.* at 669, 680, 688, 689.



punitive purposes. The Michigan statute does not merely remedy the illegal use of vehicles by enjoining such use, while leaving title in the vehicles' owners; instead, it requires the vehicles to be sold.[7] While the requirement of sale to compensate the State for the costs associated with illegal conduct might in other contexts support a remedial characterization of the law, here, the State has emphasized the punitive aim of the abatement of the Bennises' car. The State has explained: "Confiscation of an automobile in the context that defendant's car was seized * * * is swift and certain 'punishment' of the voluntary vice consumer. Recidivism is practically nil, and the deterrence value is great." Resp. Mich. Sup. Ct. Br. 22 (quoted at Pet. Br. 20-21).[8]

Under those circumstances, the forfeiture of vehicles under the statute, though characterized as the "abatement" of a "nuisance," does not appear to fall within the "long line of this Court's cases sustaining against Due Process and Takings Clause challenges the State's use of its 'police powers' to

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[7] Whereas vehicles and other chattels are to be sold when they are declared a nuisance, "buildings and places" are to be "effectually clos[ed]" for up to one year when they are declared a nuisance. Mich. Comp. Laws Ann. § 600.3825(1) (West 1987). The Michigan courts have rejected the argument that the closing of buildings and places under the abatement statute is punitive rather than remedial. *State ex rel. Macomb County Prosecuting Attorney* v. *Mesk*, 333 N.W.2d 184, 191 n.4 (Mich. Ct. App. 1983); *State ex rel. Cahalan* v. *Bernstein*, 226 N.W.2d 56, 59 (Mich. Ct. App. 1974).

[8] This case thus does not require the Court to consider how to determine, in the absence of such explicit statements, whether a particular forfeiture provision is punitive or remedial.

enjoin a property owner from activities akin to public nuisances." *Lucas* v. *South Carolina Coastal Council*, 112 S. Ct. 2886, 2897 (1992); see, *e.g.*, *Grosfield* v. *United States*, 276 U.S. 494 (1928) (affirming decree entered under the National Prohibition Act "padlocking" premises used by tenant, without lessor's knowledge, for a still); see also *United States* v. *Boynton*, 297 F. 261, 266-268 (E.D. Mich. 1924); cf. *Sweet* v. *Rechel*, 159 U.S. 380, 399 (1895); *Mugler* v. *Kansas*, 123 U.S. 623, 669 (1887). The abatement of such nuisances does not implicate an innocent owner defense, in our view.

Nor would an innocent owner defense necessarily be available to defeat other types of forfeitures, such as the forfeiture of contraband, "the possession of which, without more, constitutes a crime," *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693, 699 (1965), or the forfeiture of property specially adapted for illegal use by, for example, being equipped with secret compartments, cf., *e.g.*, *United States* v. *One 1983 Homemade Vessel Named "Barracuda,"* 858 F.2d 643 (11th Cir. 1988) (upholding forfeiture of boat with secret compartments under 19 U.S.C. 1703(a), which authorizes forfeiture of vessels "fitted out" for purpose of violating customs laws). See *United States* v. *Jeffers*, 342 U.S. 48, 54 (1951); see also *United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354, 364 (1984); *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232, 237 (1972) (per curiam).

Finally, the State has not suggested that the forfeiture of vehicles under the circumstances of this case is justified by an overriding governmental need. There may be offenses that are so serious, and so closely connected with a certain type of property, that



forfeiture would be justified even if the owner met the "all reasonable steps" standard. As this Court said in *Van Oster*, "certain uses of property may be regarded as so undesirable that the owner surrenders his control [over the property] at his peril." 272 U.S. at 467. The Court cited, as an example, laws that hold car owners civilly liable "for the negligent operation by those entrusted with their use." *Ibid.* Under such laws, it does not matter whether the owner took all reasonable precautions to prevent the negligence. See 7A Am. Jur. 2d *Automobiles & Highway Traffic* § 668, at 900-901 (1980). Nonetheless, the Court in *Van Oster* took it for granted that such laws are constitutional. See 272 U.S. at 467; see also *Young* v. *Masci*, 289 U.S. 253, 257 (1933). The imposition of strict vicarious civil liability under such laws is justified by, *inter alia*, the amount of injury and death due to careless driving. Similar considerations could lead a legislature reasonably to conclude that a specific illegal use of a specific type of property—for example, the use of rental vehicles to transport explosive devices—had produced such serious law enforcement problems that all vehicles so used should be forfeited regardless of whether a rental agency could, in a particular case, show that it had taken all reasonable precautions to prevent the illegal use. Forfeiture in that situation might be warranted to encourage extraordinary precautions against a particularly harmful illegal use. Cf. *New York Central R.R.* v. *White*, 243 U.S. 188, 201-204 (1917).

2. *This case does not involve a claimant to whom knowledge of, or involvement in, the illegal activity is sought to be imputed under traditional principles of vicarious liability.* This case, like *Calero-Toledo*,

involves a claimant who was "uninvolved in and unaware of the wrongful activity" that led to the forfeiture. 416 U.S. at 689. Knowledge of and involvement in wrongful activity may be imputed to a claimant under traditional principles of vicarious liability, but those principles are not at issue here.

The Court has indicated that traditional principles of vicarious liability will support civil punitive damages. In *Pacific Mutual Life Ins. Co.* v. *Haslip*, 499 U.S. 1 (1991), the Court rejected a substantive due process challenge to a state common law rule authorizing punitive damages against corporations for the fraud of employees acting within the scope of employment. *Id.* at 14-15. In support of that ruling, the Court cited *American Society of Mechanical Engineers, Inc.* v. *Hydrolevel Corp.*, 456 U.S. 556 (1982), which permitted the imposition on an organization of treble damages for antitrust violations based on the apparent authority of an agent to act for the organization. See *id.* at 574-576.

Forfeitures may similarly rest on theories of "vicarious liability." *Austin*, 113 S. Ct. at 2810. Agency principles have been applied by the lower courts in civil forfeiture cases. For example, in *United States* v. *One Parcel of Land Located at 7326 Highway 45 North*, 965 F.2d 311 (7th Cir. 1992), the court acknowledged that a corporation's innocent owner defense should be rejected if the knowledge of one of its principal officers could be imputed to the corporation under traditional agency principles. *Id.* at 316-319. (The court held that the officer's knowledge was not imputable in that case, however, because he did not gain it while acting for the benefit of the corporation. *Id.* at 317.) In *United States* v.



*141st Street Corp.*, 911 F.2d 870 (2d Cir. 1990), cert. denied, 498 U.S. 1109 (1991), the court sustained the forfeiture of an apartment house overrun by drug dealers, holding that the corporate owner was chargeable with the knowledge of the superintendent of the building. *Id.* at 876. See also *United States* v. *One Parcel of Real Estate*, 852 F. Supp. 1013, 1039 (S.D. Fla. 1994); *United States* v. *One Parcel of Real Estate Consisting of Approximately 4,657 Acres*, 730 F. Supp. 423, 426-428 (S.D. Fla. 1989).

Respondent has not argued that traditional principles of vicarious liability provide a basis for holding petitioner knowledgeable of, or responsible for, Mr. Bennis's conduct. There is, to our knowledge, no common law tradition that would support the imposition of punitive liability on a spouse based solely on the actions of a partner. Nor has respondent argued that liability may be premised on the "family purpose doctrine"[9] or any other joint enterprise theory.[10] Accordingly, this case does not require the Court to determine when traditional principles of vicarious liability and imputed knowledge may defeat an innocent owner claim.[11]

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[9] See W. Prosser, *Handbook of the Law of Torts* § 73, at 483-485 (4th ed. 1971).

[10] Cf. *United States* v. *One 1986 Chevrolet Monte Carlo*, 817 F. Supp. 729, 730-734 (N.D. Ill. 1993).

[11] We also note that this case does not involve a claimant who acquired an interest in the property after the illegal conduct that caused the forfeiture. The "all reasonable steps" standard would have a different application in that setting. A person who acquires property after the illegal act usually could not have exercised any power to prevent the act from occurring. Nevertheless, the person can be expected to exercise care to avoid acquiring "tainted" property that has been used for an

### C. Petitioner Has Not Satisfied The "All Reasonable Steps" Standard

1. *Petitioner bore the burden of pleading and proving that she took all reasonable steps to prevent the illegal use of her property.*[12] This Court made clear in *Calero-Toledo* that, to the extent that the Constitution requires recognition of an innocent owner defense, the owner must bear the burden of pleading and proving it. Thus, the Court found it unnecessary to determine whether the Constitution affords such a defense in *Calero-Toledo* only because "no allegation ha[d] been made or proof offered that the [yacht] company did all that it reasonably could to avoid having its property put to an unlawful use." 416 U.S. at 690. The Court gave no indication that the Constitution required the government to carry any burden of proof on that issue.

Petitioner recognizes that *Calero-Toledo* supports imposing the burden of proving innocent owner status on claimants in *in rem* forfeiture proceedings. Pet. Br. 39. She also recognizes (*id.* at 45 n.25) that the Puerto Rico statute at issue in *Calero-Toledo* was modeled on a federal statute that is governed by the customs procedures set out in 19 U.S.C. 1615, see 416

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illegal purpose that subjects it to forfeiture. A person who fails to take reasonable steps under the circumstances to determine the provenance of what he is acquiring may fail to qualify as an "innocent" owner for constitutional purposes.

[12] Petitioner did not argue in the courts below or in her petition for a writ of certiorari that the State bore the burden of proof on the innocent owner issue. Moreover, it is not clear that the burden-of-proof issue is fairly included within the questions presented in her petition. We address the issue in the event the Court determines that it should be resolved.



U.S. at 686 n.25, 689 n.27, and that Section 1615 places the burden of proof on claimants in forfeiture proceedings with respect to all issues except the showing of probable cause to institute the proceeding. Every federal court of appeals to consider the issue has rejected constitutional challenges to Section 1615's allocation of the burden of proving innocent owner status to the claimant.[13]

Petitioner nonetheless contends that *Calero-Toledo*'s determination that the burden of proof rests on the claimant is inapposite here. She notes that, whereas *Calero-Toledo* involved a proceeding *in rem*, this is a proceeding *in personam*. Pet. Br. 45 n.25. Petitioner fails, however, to explain why that matters. The order declaring the Bennises' vehicle a nuisance and requiring its sale could have been entered in a proceeding *in rem*. See *C.J. Hendry Co.* v. *Moore*, 318 U.S. 133, 140 (1943). Petitioner does not contend that the *in personam* character of the proceeding gave it collateral consequences that would not have flowed from an *in rem* proceeding.

Petitioner also asserts that abatement proceedings are "quasi-criminal," Pet. Br. 43, based on respondent's acknowledgement that they serve punitive and deterrent purposes. Proceedings under the Puerto Rico statute at issue in *Calero-Toledo*, however, were

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[13] See *United States* v. *228 Acres of Land & Dwelling*, 916 F.2d 808, 814 (2d Cir. 1990), cert. denied, 498 U.S. 1091 (1991); *United States* v. *Santoro*, 866 F.2d 1538, 1544 (4th Cir. 1989); *United States* v. *$250,000 in U.S. Currency*, 808 F.2d 895, 900 & n.17 (1st Cir. 1987) (citing cases); *United States* v. *$2,500 in U.S. Currency*, 689 F.2d 10, 12-16 (2d Cir. 1982), cert. denied, 465 U.S. 1099 (1984); *United States* v. *One 1970 Pontiac GTO*, 529 F.2d 65, 66 (9th Cir. 1976) (per curiam).

also said to serve punitive and deterrent purposes. See 416 U.S. at 686. Moreover, petitioner's characterization of the present proceeding is at odds with this Court's consistent refusal to hold that civil forfeiture proceedings are "subject to the procedural rules governing criminal prosecutions." *One Lot Emerald Cut Stones*, 409 U.S. at 237 (quoting *Helvering* v. *Mitchell*, 303 U.S. 391, 400 (1938)); see *Austin*, 113 S. Ct. at 2804 n.4. Finally, even if abatement proceedings were criminal in nature, that characteristic would not forbid the State from allocating the burden of proof to petitioner on her innocent owner defense. See *Martin* v. *Ohio*, 480 U.S. 228 (1987) (defendant in criminal case may be required to establish affirmative defenses such as self-defense).[14]

Petitioner's reliance (Pet. Br. 44) on this Court's "recent takings jurisprudence" is misplaced. Petitioner argues that, under *Lucas* v. *South Carolina Coastal Council*, 112 S. Ct. 2886 (1992), and *Dolan* v. *City of Tigard*, 114 S. Ct. 2309 (1994), the forfeiture of property that has been used illegally is presumptively a "taking" for which just compensation is due, and that the State must rebut that presumption by proving her culpability. The presumption, however, is

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[14] Although it is unnecessary to apply the three-factor test of *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), as advocated by petitioner, Pet. Br. 39-44, that test does not assist her. It would require no extended analysis to conclude that a putative innocent owner may fairly be required to establish that he took the steps that qualify him for that status. "It is * * * entirely sensible to burden the party more likely to have information relevant to the facts * * * to demonstrate th[ose] facts * * *. Such was the rule at common law." *Concrete Pipe & Products of California, Inc.* v. *Construction Laborers Pension Trust*, 113 S. Ct. 2264, 2281 (1993).



to the contrary: "[I]t is settled that if the * * * government's actions comport, procedurally and substantively, with the terms of a lawfully enacted forfeiture statute, it may seize private property without compensating the owner." *United States* v. *One Parcel of Property with Bldgs., Appurtenances, & Improvements*, 960 F.2d 200, 210 (1st Cir. 1992); see also *Redford* v. *United States Department of Treasury*, 691 F.2d 471, 473 (10th Cir. 1982). Nothing in *Lucas* or *Dolan*, neither of which involved a forfeiture of property that had been used illegally, casts doubt on that principle.

2. *Petitioner did not allege or prove that she took all reasonable steps to prevent illegal use of the car.* In her answer to the abatement complaint and at trial, petitioner claimed only that she lacked actual knowledge that her husband would use the car illegally. See p. 3, *supra*. She did not allege or prove that she lacked reason to know that her husband would use their car illegally.[15] Nor did she allege or

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[15] Even now, petitioner does not claim that she lacked reason to know of the illegal use. Instead, she asserts that there is no "evidence in the record from which it could be inferred that Tina Bennis 'should [have] know[n]' that John Bennis was 'likely to use the [car]' in the manner the trial court found him to have used it." Pet. Br. 27. To the contrary, such an inference arguably could be drawn from the security guard's testimony that he had seen Mr. Bennis soliciting prostitutes in the neighborhood of the arrest on two prior occasions. J.A. 52-53. That testimony suggests a pattern of behavior, of which it would be more reasonable to expect a spouse to know than a single instance of behavior. In any event, the State was not required to establish that Mr. Bennis's behavior was such that petitioner had reason to know; rather, it was petitioner's burden to establish innocent owner staus. See pp. 22-25, *supra*.

prove that she took all reasonable steps to prevent such use. She is therefore in precisely the same position as the yacht company in *Calero-Toledo*. Under *Calero-Toledo*, the forfeiture of petitioner's interest in the car must be sustained.

### D. The Court Should Reject The Innocent Owner Standard That Petitioner Proposes

Although petitioner appears at times to support the *Calero-Toledo* standard, see Pet. Br. 14-18, she in fact proposes a significantly more generous test for innocent ownership. Rather than adopting *Calero-Toledo*'s suggestion that the owner take "*all* reasonable steps" to prevent the unlawful use of his property, petitioner suggests that it is enough if the owner exercises reasonable care at one step: when entrusting the property to another. *Id.* at 24-27. In the alternative, she argues that under any standard of care, she could not reasonably be expected to have taken any steps to prevent the illegal use of her car, because she neither knew nor should have known about her husband's illegal conduct. *Id.* at 27-29. Neither argument is persuasive.

1. The Court in *Calero-Toledo* reaffirmed that the government may subject property to forfeiture to ensure that the owner takes steps to prevent its illegal use. 416 U.S. at 688. The Court did not suggest, however, that such steps are limited to exercising care in entrusting the property to another. In particular, there is no suggestion that the yacht owner acted negligently in entrusting the yacht to the lessees. In fact, the forfeiture rested on the discovery of marijuana on board the yacht more than a year after the lessee took possession, *id.* at 665-666.



Nor does logic support the "negligent entrustment" limitation urged by petitioner. It would make no sense, for example, to conclude that the yacht company in *Calero-Toledo* would have been constitutionally entitled to the return of its yacht if it had taken all reasonable steps to prevent unlawful conduct *before* transferring possession—even if, *after* transferring possession of the yacht, it gained knowledge that the lessor was keeping illegal drugs on board but did nothing in light of that knowledge. It is common for property owners to take steps after they transfer their property to make sure that the transferee is using the property in accordance with the conditions of the transfer. It is therefore reasonable for the forfeiture laws to encourage the owner to take reasonable steps after property has been transferred to prevent unlawful use.

Petitioner argues that she lacked the ability to control her husband's use of the car because, as a joint owner, he had the "right" to use it without her consent. Pet. Br. 27. The yacht company in *Calero-Toledo* could have made a similar argument. Although the company "included in the lease a prohibition against use of the yacht for an unlawful project," *Calero-Toledo*, 416 U.S. at 693 (Douglas, J., dissenting in part), after the lessee came into possession it presumably did not need the company's consent to use the yacht. *Calero-Toledo* illustrates that there are many situations, besides joint ownership, in which the person who causes the forfeiture does not need the owner's additional permission to use the property once it has been "entrusted" to that person.

The same reasoning defeats petitioner's assertion that "she did not in any meaningful sense have the

legal power to prevent his [illegal] use [of the car]." Pet. Br. 27. The yacht company in *Calero-Toledo* likewise presumably had limited means, as a practical matter, of preventing the illegal use of its yacht. Petitioner observes that, unlike the yacht company, she did not have "a commercial relationship" with the person who used the property illegally. *Id.* at 28. The absence of a commercial relationship, however, does not necessarily mean a lack of control. Indeed, an owner who has a personal relationship with the person who used the property illegally may be in a better position to prevent that use than an owner who has only a commercial relationship with the other person, and who relinquishes possession of the property. See, *e.g.*, *United States* v. *One 1973 Buick Riviera Automobile*, 560 F.2d 897, 901 (8th Cir. 1977) (per curiam); see also *United States* v. *One 1971 Chevrolet Corvette*, 393 F. Supp. 344, 348 (E.D. Pa. 1975).

In sum, there are no doubt differences between petitioner's relationship with Mr. Bennis in regard to their car and the yacht company's relationship with the lessee in regard to the yacht. Such differences may well be relevant in determining what steps the claimant could reasonably have taken to prevent the illegal use, since they may affect the claimant's ability to control the use of the property. But those differences do not justify a departure in this case from the "all reasonable steps" standard suggested in *Calero-Toledo*.

2. The Court should reject petitioner's argument that she could not reasonably be expected to have taken any steps to prevent Mr. Bennis's illegal use of the car. That argument is based on her assertion



that, "if one has no knowledge or reason to know of a wrongful use, then one cannot be expected to take affirmative steps to prevent that use." Pet. Br. 28.

Even if an owner lacks reason to know that a transferee will use property illegally (a circumstance that petitioner has not demonstrated), the owner can reasonably be expected in many cases to take precautions against illegal use. For example, it is reasonable to expect a landlord periodically to visit rental property in a drug-infested neighborhood whether or not he suspects any tenants of drug use. Cf. *141st Street Corp.*, *supra*. It may be reasonable to expect the owners of boats and airplanes to check the backgrounds and monitor the activities of lessors, especially in drug-smuggling areas. See *1966 Beechcraft Aircraft*, 777 F.2d at 951; *United States* v. *One Blue Lobster Vessel Named Tony, Jr.*, 639 F. Supp. 865, 872 (S.D. Fla. 1986); *United States* v. *One 1980 Stapleton Pleasure Vessel Named Threesome*, 575 F. Supp. 473, 478 (S.D. Fla. 1983). To cite a third example, financial organizations may reasonably be expected to use available computer technology to prevent money-laundering, even in the absence of individualized suspicion. See 52 Fed. Reg. 11,437-11,438 (1987).

It may be true in many cases that a spouse who lacks reason to know that the other spouse will use jointly owned property illegally cannot reasonably be expected to take any precautions. But that is not necessarily true in all cases. We submit that innocent owner claims are better resolved by the flexible standard suggested in *Calero-Toledo* than by categorical rules. A categorical rule for spouses would fail to take into account the many ways in which spouses may hold property. And a categorical

rule for joint owners would fail to take into account the variety of contexts, in addition to marriage, in which property may be jointly owned. "[W]hat one 'reasonably could be expected [to do]' to prevent criminal use of property is a standard that must be tailored to individual circumstances." *United States* v. *One 1976 Lincoln Mark IV*, 462 F. Supp. 1383, 1391 (W.D. Pa. 1979) (quoting *Calero-Toledo*, 416 U.S. at 689).

## CONCLUSION

The judgment of the Michigan Supreme Court should be affirmed.

Respectfully submitted.

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